APPEAL NO. 010774

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on February 12 and March 12, 2001. With respect to the issues before her the hearing officer determined that the appellant (carrier) is not relieved of liability for death benefits because the fatal injury did not occur while the deceased, (decedent) was in a state of intoxication and that respondent (claimant beneficiary) was the wife of the decedent and is a proper beneficiary. The carrier appeals the determination that the decedent was not in a state of intoxication, contending that the claimant beneficiaries failed to meet their burden to prove the decedent was not intoxicated. The hearing officer's determination that the claimant beneficiary is a proper beneficiary has not been appealed and has become final. In their responses, the claimant beneficiary and the respondent minor beneficiaries urge affirmance.

DECISION

Affirmed.

First we note that the hearing officer failed to reflect in her Decision and Order that Ms. J and Mr. A also testified for the claimant beneficiary and the minor claimant beneficiaries and that Dr. A testified for the carrier.

On _____, the decedent was killed when he tried to jump from a water truck he was driving as it slid off the shoulder of the road and rolled over while he was executing a U-turn. Following the incident, blood was taken from the decedent for a drug/alcohol screen. The test was positive for alcohol in the amount of 0.03 grams per 100 milliliters of blood, less than the amount legally allowed and benzoylecgonine, a metabolite of cocaine, in the amount of 0.34 milligrams per liter or 340 nanograms per milliliter.

Section 406.032(1)(A) provides that a carrier is not liable for compensation if the employee was in a state of intoxication at the time of the injury. For purposes of this case, because the alcohol was below the legal maximum, intoxication is defined as not having the normal use of mental or physical faculties from the voluntary introduction of controlled substance into the body. *See* Section 401.013(a)(2)(B). There is no presumptive standard of intoxication for cocaine use. Texas Workers' Compensation Commission Appeal No. 92723, decided February 10, 1993. Rather, the test is whether the employee had the normal use of his or her mental or physical faculties. Further, an employee is presumed sober. Texas Workers' Compensation Commission Appeal No. 94247, decided April 12, 1994. A carrier only rebuts the presumption by presenting probative evidence of intoxication. Texas Workers' Compensation Commission Appeal No. 91018, decided September 19, 1991. Once a carrier introduces probative evidence of intoxication, the burden shifts to the employee to prove that he or she was not intoxicated at the time of injury. In this case, the hearing officer properly determined that the evidence was sufficient to shift the burden to the claimant beneficiary and the minor claimant beneficiaries to prove

that the decedent was not intoxicated because the positive EMIT screen demonstrated benzoylecgonine was present in the decedent's blood and that the testimony from Dr. A raised the question of whether the decedent was intoxicated.

In regard to the disputed issue of whether the decedent was intoxicated, the U.S. Department of Labor concluded in its investigative report dated July 27, 1999, that there was no sign of excessive speed, careless operation, intoxication, or other operating faults. Further, Dr. G, testifying as a forensic toxicologist, stated that it was his opinion that the decedent was not intoxicated. Dr. A and Dr. T, who are medical doctors, reported contrary opinions. Whether a claimant is intoxicated at the time of an injury is a question of fact for the hearing officer to decide. Texas Workers' Compensation Commission Appeal No. 950266, decided March 31, 1995.

The carrier contends that admitting Dr. G's evidence was error because, not being a medical doctor, he is not qualified to offer an opinion on whether a person is intoxicated. We find no abuse of discretion in the hearing officer's evidentiary ruling concerning Dr. G.

As the Appeals Panel stated in Texas Workers' Compensation Commission Appeal No. 000651, decided April 11, 2000, we are not saying that Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 113 S. Ct. 2786 (1993) and Merrell Dow Pharmaceuticals, Inc. v. Havner, 953 S.W.2d 706 (Tex. 1997), cert denied 523 U.S. 1119, cited by the carrier, have no place in a workers' compensation proceeding; they can be used by the hearing officer to evaluate the evidence and to assess the weight and credibility he or she will assign thereto. The reliability, weight, and relevance of such evidence rests solely with the hearing officer, and we will reverse a factual determination of a hearing officer only if that determination is against the great weight of the evidence.

The hearing officer was acting within her province as the fact finder in resolving the conflicts and inconsistencies in the expert evidence in favor of a determination that the decedent had the normal use of his mental and physical faculties at the time of his injury and, thus, was not intoxicated. Our review of the record demonstrates that her determination that the decedent was not intoxicated is sufficiently supported by the evidence and is not so contrary to the great weight of the evidence as to be clearly wrong or manifestly unjust. The hearing officer is the sole judge of the weight and credibility of the evidence (Section 410.165(a)) and, as the trier of fact, resolves the conflicts and inconsistencies in the evidence (Garza v. Commercial Insurance Co. of Newark, New Jersey, 508 S.W.2d 701 (Tex. Civ. App.-Amarillo 1974, no writ)). Also, the hearing officer is not bound by expert evidence. While another fact finder may have drawn different inferences from the evidence, we cannot say that the challenged finding is so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust. In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

The decision and order of the hearing officer are affirmed.

Philip F. O'Neill
Appeals Judge

CONCUR:

Susan M. Kelley
Appeals Judge

Gary L. Kilgore
Appeals Judge